Supreme Court, U.S.
FILED
JUL 23 1992
OFFICE OF THE CLERK

No. 91-2032

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

TRANSOIL (JERSEY) LTD., *Petitioner*

vs.

BELCHER OIL COMPANY, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counsel of Record:
Of Counsel:
JAMES M. McGRAW
D. SCOTT FUNK
Looper, Reed, Mark & McGraw
Nine Greenway Plaza, Suite 1717
Houston, Texas 77046
(713) 877-6355

Of Counsel:
NEIL BOWMAN
Coastal Fuels Marketing, Inc.
f/k/a Belcher Oil Company
P.O. Box 025500
Miami, Florida 33102
(305) 551-5200

Attorneys for Respondent, Belcher Oil Company

JULY 1992

QUESTIONS PRESENTED FOR REVIEW

(1) WHETHER THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE VERDICT UNDER THE INSTRUCTIONS SUBMITTED TO THE JURY?

(2) WHETHER THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE VERDICT UNDER INSTRUCTIONS REQUESTED BY TRANSOIL BUT NOT SUBMITTED TO THE JURY?

(3) WHETHER TRANSOIL CAN SUPPORT THE JURY'S VERDICT UNDER THEORIES OF RECOVERY AND INSTRUCTIONS THAT TRANSOIL DID NOT REQUEST BE SUBMITTED TO THE JURY?

(4) WHETHER THE COURT OF APPEALS PROPERLY REVERSED AND RENDERED THIS CASE IN THE ABSENCE OF SUBSTANTIAL EVIDENCE TO SUPPORT THE JURY'S VERDICT?

NAMES OF ALL PARTIES

Transoil (Jersey) Ltd.:
Plaintiff, Appellee & Petitioner

Belcher Oil Company ("Belcher"):
Defendant, Appellant & Respondent
Now known as Coastal Fuels Marketing, Inc.
a wholly owned subsidiary of
The Coastal Corporation

The Chivney Foundation:
Owner of Transoil

The Coastal Corporation and its subsidiaries:
Parent corporation and sister
corporations of Belcher

Eduardo Bent:
A beneficiary of The
Chivney Foundation

BCB Holdings Anstalt:
Assignee of proceeds
from recovery, if any,
by Transoil

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

NAMES OF ALL PARTIES ii

INDEX OF AUTHORITIES v

STATEMENT OF THE CASE 1

ARGUMENT 2

I. SUMMARY 2

II. WHETHER THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE VERDICT UNDER THE INSTRUCTIONS SUBMITTED TO THE JURY? 3

III. WHETHER THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE VERDICT UNDER INSTRUCTIONS REQUESTED BY TRANSOIL BUT NOT SUBMITTED TO THE JURY? 3

Table of Contents, Continued **Page**

IV. WHETHER TRANSOIL CAN SUPPORT THE JURY'S VERDICT UNDER THEORIES OF RECOVERY AND INSTRUCTIONS THAT TRANSOIL DID NOT REQUEST BE SUBMITTED TO THE JURY? 4

V. WHETHER THE COURT OF APPEALS PROPERLY REVERSED AND RENDERED THIS CASE IN THE ABSENCE OF SUBSTANTIAL EVIDENCE TO SUPPORT THE JURY'S VERDICT? 5

VI. AN INTERPRETATION OF RULE 51 IS UNNECESSARY TO THE DISPOSITION OF THIS CASE 6

VII. THIS CASE FAILS TO SATISFY THE CRITERIA SET FORTH IN SUPREME COURT RULE 10.. 7

CONCLUSION 9

INDEX OF AUTHORITIES

Page(s)

Cases:

Abel v. Miller,
824 F.2d 1522 (7th Cir. 1987). 8

Braxton v. United States,
111 S. Ct. 1854 (1991). 9

Getty Petroleum Corp. v. Bartco Petroleum Corp.,
858 F.2d 103 (2d Cir. 1988),
cert. denied, 490 U.S. 1006 (1990). 7, 8

Miller v. Rykoff-Sexton, Inc.,
845 F.2d 209 (9th Cir. 1988). 4, 5

Neely v. Martin K. Eby Constr. Co.,
386 U.S. 317 (1967). 6, 8

New York, N.H. & H.R. Co. v. Henigan,
364 U.S. 441 (1960). 6, 8

NLRB v. Hendricks County Rural Elec.,
454 U.S. 170 (1981). 9

Rudolph v. United States,
370 U.S. 269 (1962). 9

Talley v. United States Postal Serv.,
720 F.2d 505 (8th Cir. 1983),
cert. denied, 466 U.S. 952 (1984). 6

Index of Authorities, Continued **Page(s)**

Transoil (Jersey) Ltd. v. Belcher Oil Co.,
950 F.2d 1115 (5th Cir. 1992). 3, 4, 8

United States v. Atkinson,
297 U.S. 157 (1936). 4

United States v. Johnston,
268 U.S. 220 (1925). 9

Wright v. Farmers Co-Op of Arkansas and Oklahoma,
620 F.2d 694 (5th Cir. 1980). 5

Statutes:

Tex. Bus. & Comm. Code Ann. § 2-711
(Vernon 1968). 5

Rules:

Fed. R. Civ. P. 51 . . . . . 2, 6, 7

Sup. Ct. R. 10.1(a) 7, 8

Secondary Authorities:

5A J. Moore & J. Lucas, Moore's Federal Practice ¶ 51.03
(2d ed. 1985). 5

No. 91-2032

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

TRANSOIL (JERSEY) LTD., *Petitioner*

vs.

BELCHER OIL COMPANY, *Respondent*

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Although there are numerous misstatements of the facts and law in Transoil's Statement of the Case, only those that are pertinent to the resolution of Transoil's Petition for Writ of Certiorari are addressed below.

ARGUMENT

I.

SUMMARY

Transoil's Petition for Writ of Certiorari should be denied as it is nothing more than an attempt to have the Supreme Court of the United States review the court of appeals' finding that there was **no evidence** to support the jury's verdict.

There was **no evidence** to support the verdict under the instructions submitted to the jury; there was **no evidence** to support the verdict under instructions Transoil requested but that were not submitted to the jury; and Transoil cannot now support the verdict under theories and instructions that it never even requested be submitted to the jury.

Fully aware of this, Transoil has attempted to mischaracterize this case as turning on the interpretation of Rule 51; however, it does not. This mischaracterization is an attempt to obscure the fact that this case does not meet any of the characteristic prerequisites supporting a grant of certiorari. This Court should not waste its valuable time reviewing a lengthy and detailed record with over 300 exhibits to determine the only issue extant in this case -- the legal sufficiency of the evidence.

II.

WHETHER THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE VERDICT UNDER THE INSTRUCTIONS SUBMITTED TO THE JURY?

The court of appeals found that the evidence presented by Transoil did not support the jury's award of damages under the legal theory upon which the case was submitted to the jury. *Transoil (Jersey) Ltd. v. Belcher Oil Co.*, 950 F.2d 1115, 1121-22 (5th Cir. 1992); Transoil Petition, Appendices p. 13a. The record on appeal contains 9 volumes of pleadings filed, 9 volumes of testimony and argument from trial (almost 2000 pages in length) and over 330 exhibits. The court of appeals is more than qualified to review the record and determine whether there was substantial evidence supporting the verdict, and it would be a waste of judicial time and resources for this Court to again perform such a review.

III.

WHETHER THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE VERDICT UNDER INSTRUCTIONS REQUESTED BY TRANSOIL BUT NOT SUBMITTED TO THE JURY?

Transoil claims that it was not allowed to defend its verdict under instructions it requested, but that the trial court refused to submit. This is simply incorrect. As reflected in the opinion of the court of appeals, it specifically addressed and rejected Transoil's argument

that the instructions requested and not submitted supported the jury's verdict:

> **While it is true that Transoil requested several different damage instructions, none of these instructions supports recovery.**

Belcher Oil Co., 950 F.2d at 1122; Transoil Petition, Appendices p. 14a (emphasis added).

Thus, this is another issue of whether there is legally sufficient evidence in the record to support the verdict under instructions requested by Transoil that were not submitted to the jury. Again, the court of appeals very capably performed such review and this Court should not be required to duplicate the court of appeals' efforts.

IV.

WHETHER TRANSOIL CAN SUPPORT THE JURY'S VERDICT UNDER THEORIES OF RECOVERY AND INSTRUCTIONS THAT TRANSOIL DID NOT REQUEST BE SUBMITTED TO THE JURY?

Transoil now claims that the court of appeals erred in refusing to allow Transoil to support the jury's verdict on theories of recovery and instructions that not only were not submitted to the jury, but that Transoil did not even request be submitted to the jury.

It has long been the rule that a plaintiff has the burden of requesting and submitting theories of recovery to a jury necessary to support its case, and a failure to do so waives such theories. *United States v. Atkinson*, 297 U.S. 157 (1936); *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209,

213 (9th Cir. 1988)("[I]f an appellant does not request an instruction at trial, the issue is not preserved on appeal."); *Wright v. Farmers Co-Op of Arkansas and Oklahoma*, 620 F.2d 694, 699 (5th Cir. 1980)(No issue on appeal because "Plaintiffs simply failed to request an instruction setting forth the particular theory of their case."); 5A J. Moore & J. Lucas, Moore's Federal Practice ¶ 51.03 (2d ed. 1985).

Transoil seeks to support the jury's verdict pursuant to Section 2-711(1) of the Uniform Commercial Code as adopted by the Texas Business & Commerce Code (the "UCC"). There were numerous contested fact issues that a jury would have had to find in favor of Transoil before it would have been entitled to a "rejection" remedy under UCC 2-711.[1] Transoil did not request submission of this theory to the jury. Transoil therefore waived this theory and cannot raise it now.

V.

WHETHER THE COURT OF APPEALS PROPERLY REVERSED AND RENDERED THIS CASE IN THE ABSENCE OF SUBSTANTIAL EVIDENCE TO SUPPORT THE JURY'S VERDICT?

When there is no substantial evidence to support the jury's verdict and the judgment entered in favor of a plaintiff, the proper disposition is for the court of appeals to reverse and render the case in favor of the defendant.

---

[1] For example, two such issues were whether Transoil's purported rejection was within a reasonable time after delivery and whether Transoil seasonably notified Belcher of such purported rejection.

Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 325-26 (1967); *New York, N.H. & H.R. Co. v. Henigan*, 364 U.S. 441, 442 (1960); *see also Talley v. United States Postal Serv.*, 720 F.2d 505, 508 (8th Cir. 1983), *cert. denied*, 466 U.S. 952 (1984).

VI.

AN INTERPRETATION OF RULE 51 IS UNNECESSARY TO THE DISPOSITION OF THIS CASE.

Transoil has mischaracterized Belcher's positions and the holding of the court of appeals in an obvious attempt to construe this case as turning on an interpretation of Rule 51 of the Federal Rules of Civil Procedure. It does not.

First, Transoil has misrepresented to this Court that Belcher was allowed to "attack" the jury charge without objecting to it. Transoil Petition, p. 17-20. Belcher has at all times steadfastly asserted that the charge as submitted to the jury was correct. The charge correctly stated the measure of direct damages, and correctly informed the jury that they could not award consequential or incidental damages. As such, there was no reason or need for Belcher to object to the charge and its failure to do so reflects its satisfaction with the charge, and nothing more. Belcher's appeal related solely to the legal sufficiency of evidence, not the validity of the charge.

Second, Transoil briefed in detail its claim that the court of appeals failed to allow Transoil to defend its judgment under instructions requested but not submitted to the jury. As mentioned above, the court of appeals

expressly considered and rejected Transoil's argument that such theories would support the verdict. Any suggestion by Transoil otherwise is without merit and another attempt to misconstrue this case as turning on Rule 51.

VII.

THIS CASE FAILS TO SATISFY THE CRITERIA SET FORTH IN SUPREME COURT RULE 10.

Supreme Court Rule 10.1(a) lists three situations in which it is appropriate to invoke this Court's discretionary jurisdiction, none of which exists in this case.

1. ***When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter.*** Sup. Ct. R. 10.1(a).

Because the court of appeals' decision rests on the legal sufficiency of the evidence and is fact specific, it does not conflict with any other United States court of appeals' decision. Transoil claims that the Fifth Circuit's decision conflicts with the Rule 51 practice in the Fourth and Seventh Circuits, which prohibits an appellant from complaining of a jury question that was not objected to at trial. Transoil's Petition, p. 18-19. However, the Fifth Circuit's opinion does nothing to stray from this well-settled rule.

To the contrary, the Fifth Circuit did not base its reversal on a complaint about the charge, because Belcher has never raised one. The Fifth Circuit's result conforms in all respects with the practice in other circuit courts of appeals. *E.g., Getty Petroleum Corp. v. Bartco Petroleum*

Corp., 858 F.2d 103 (2d Cir. 1988), *cert. denied*, 490 U.S. 1006 (1990); *Abel v. Miller*, 824 F.2d 1522 (7th Cir. 1987).

2. ***When a United States court of appeals has decided a federal question in a way in conflict with a state court of last resort.*** Sup. Ct. R. 10.1(a).

Transoil has not asserted that the court of appeals' decision conflicts with a state court of last resort.

3. ***When a United States court of appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.*** Sup. Ct. R. 10.1(a).

The court of appeals did not depart from the usual course of judicial proceedings, nor did it sanction any such departure by the lower court. Transoil alleges that the court of appeals deviated from accepted judicial proceedings by failing to consider alternative damage instructions, and by rendering judgment after reversing the trial court's verdict. Transoil Petition, p. 14, 22.

The court of appeals did consider alternative instructions requested by Transoil and found that none of them were supported by the evidence. *Belcher Oil Co.*, 950 F.2d at 1122; Transoil Petition, Appendix 14a. In addition, the court of appeals followed recognized judicial procedures in rendering verdict after reversing a judgment upon a showing of legally insufficient evidence. This Court has recognized, with a properly filed motion for judgment *non obstante veredicto*, that rendering judgment is an appropriate remedy on appeal. *Neely v. Martin K. Eby Constr.*, 386 U.S. 317, 325-26 (1967); *New York, N.H. & H.R. Co. v. Henigan*, 364 U.S. 441, 442 (1960).

CONCLUSION

This Court, as the ultimate court of law in the United States and final arbiter of the Constitution, has stated that its discretionary jurisdiction has a principal purpose in resolving conflicts of federal law. *See, e.g., Braxton v. United States*, 111 S. Ct. 1854 (1991). No such conflicts exist in this case. This Court has resisted using its discretionary jurisdiction to analyze sufficiency of the evidence arguments, stating: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). When this Court has granted certiorari, but discovered that the issues are limited to fact questions, this Court has dismissed the writ as improvidently granted. *See NLRB v. Hendricks County Rural Elec.*, 454 U.S. 170, 176 n.8 (1981); *Rudolph v. United States*, 370 U.S. 269 (1962).

Transoil's Petition for Writ of Certiorari disregards these considerations, and solely offers this Court the wearisome opportunity to review a lengthy appellate record to determine whether the evidence supports the jury's verdict. Accordingly, Transoil's Petition for Writ of Certiorari should be summarily denied.

Respectfully submitted,

JAMES M. McGRAW, *Counsel of Record*
Looper, Reed, Mark & McGraw
Nine Greenway Plaza, Suite 1717
Houston, Texas 77046
(713) 877-6355

Of Counsel: NEIL BOWMAN
D. SCOTT FUNK